In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-329

FRANCIS X. BELLOTTI,
ATTORNEY GENERAL OF THE
COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS

v.

WILLIAM BAIRD, ET AL.,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Brief for the Appellants

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Opinions Below

This case is before the Court for the second time. The District Court's original decision holding the statute unconstitutional was filed on April 28, 1975, and is reported at 393 F. Supp. 847 (D. Mass. 1975) (1 App. 499). This Court, in an opinion dated July 1, 1976, and reported at 428 U.S. 132, vacated the District Court's judgment on abstention grounds and

remanded for further proceedings, including certification of certain questions to the Massachusetts Supreme Judicial Court. The District Court certified nine questions to the Supreme Judicial Court on August 31, 1976, and the Supreme Judicial Court answered these questions in an opinion dated January 25, 1977. The Supreme Judicial Court's opinion appears in the official advance sheets at Mass. Adv. Sh. (1977) 96 and is published in the Northeastern Reporter at 360 N.E. 2d 288 (Mass. 1977) (1 App. 531). On February 10, 1977, the District Court issued its opinion and order granting a preliminary injunction against appellants, and this opinion is reported at 428 F. Supp. 854 (D. Mass. 1977) (1 App. 610). After trial in the fall of 1977, the District Court issued its opinion and entered a final order permanently enjoining appellants from enforcing the statute. This opinion, dated May 2, 1978, is reported at 450 F. Supp. 997 (D. Mass.) and, pursuant to this Court's rules, was reprinted in the appendix to the jurisdictional statement filed on August 25, 1978, and is also reproduced at 1 App. 640.[1]

Jurisdiction

The Attorney General and the District Attorneys of the Commonwealth's ten (now eleven) administrative districts appeal from a final order of a three-judge panel of the United States District Court for the District of Massachusetts. A single district judge convened the three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970) because plaintiffs-appellees' complaint sought permanent injunctive relief under

[1] On June 20, 1978, the District Court issued an amended final order correcting a typographical error in its order of May 2, 1978. Both of these orders were also reproduced in the appendix to the jurisdictional statement.

42 U.S.C. § 1983 (1970) against the Attorney General and the District Attorneys, the state officials charged with enforcement of the statute's provisions.[2]

In summary, plaintiffs' complaint in the District Court claimed that the statute violates the due process and equal protection clauses of the Fourteenth Amendment by requiring a physician to obtain the consent of a pregnant minor's parents before performing an abortion, thus, according to plaintiffs, imposing a burdensome and discriminatory requirement. Upon remand and after receiving responses to its certified questions from the Massachusetts Supreme Judicial Court, the District Court handed down its decision and entered an order on May 2, 1978, permanently enjoining appellants from enforcing the statute. Appellants filed their notice of appeal in the District Court on June 26, 1978 (previously reproduced in the appendix to the jurisdictional statement), and their jurisdictional statement on August 25, 1978. This Court has jurisdiction of this appeal under 28 U.S.C. § 1253 (1970) and noted probable jurisdiction on October 30, 1978. 47 U.S.L.W. 3292-93 (October 31, 1978).

Statute Involved

The District Court determined that Massachusetts General Laws ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, was unconstitutional. This statute differs significantly only in its codification identification from the statute which was before this Court in *Bellotti* v.

[2] 28 U.S.C. § 2281 (1970) was repealed by 90 Stat. 1119. However, the repeal effected by this statute did not affect actions commenced on or before its date of enactment. 90 Stat. 1119, § 7.

Baird, supra.[3] The statute appears in the General Laws in the following form:

> § 12S. If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother. If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died, or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient. The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.
>
> Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent for the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve U.

[3] The citation to the statute considered in *Bellotti* was G.L. ch. 112, § 12P. St. 1977, ch. 397, repealed § 12P and inserted § 12S in its place. Minor alterations in paragraphing and corrective reference changes without relevance to present purposes were also made.

Questions Presented

1. Whether G.L. ch. 112, § 12S, as inserted by St. 1974, ch. 706, § 1, and renumbered by St. 1977, ch. 397, violates the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery, those for whom parental consultation would not be in their best interests, and those incapable of giving "informed consent") under the Fourteenth Amendment to the Constitution of the United States by prohibiting physicians from performing abortion surgery upon such minors without first obtaining parental consent or judicial authorization and is therefore invalid on its face.

2. Whether the District Court erred in refusing defendants-appellants permission to conduct a survey of health care provider consent practices in Massachusetts.

3. Whether the District Court correctly determined that plaintiffs-appellees might properly challenge G.L. ch. 112, § 12S, on its face rather than as applied to certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

4. Whether the District Court properly refused to enter an injunction carefully drawn to prohibit defendants-appellants from enforcing G.L. ch. 112, § 12S, only in those instances in which it had determined that enforcement would violate the constitutional rights of certain minors (e.g., those capable of giving "informed consent" to abortion surgery and those for whom parental consultation would not be in their best interests).

5. Whether the District Court may order the defendants to pay plaintiffs' litigation costs incurred in this Court and the District Court "lost because of defendants' mistaken advocacy."

Statement of the Case and Summary of Prior Proceedings

Prior Proceedings

Plaintiffs-appellees commenced this civil rights action under 42 U.S.C. § 1983 (1970) in December, 1974. The original plaintiffs were William Baird, four female adolescents who sued under pseudonyms, Parents' Aid Society, Inc., and Gerald Zupnick. The original defendants were the Attorney General of the Commonwealth and the District Attorneys of the ten (now eleven) administrative districts of the Commonwealth. The gravamen of the original complaint was that G.L. ch. 112, § 12P, as inserted by St. 1974, ch. 706, and now renumbered by St. 1977, ch. 397 (the statute), violated the Fourteenth Amendment's due process and equal protection clauses because the statute required unmarried pregnant minors to obtain either parental consent or judicial approval for an abortion. Complaint, ¶¶ IV, VII. The District Court permitted certain parents to intervene as defendants and dismissed three of the adolescent plaintiffs and all of the intervening parents save Jane Hunerwadel from the case for want of proof. *Baird* v. *Bellotti*, 393 F. Supp. 847, 849-50 (D. Mass. 1975) (*Baird I*). Plaintiffs moved that each named plaintiff be certified as representative of its respective class, and specifically moved that the named unmarried pregnant minor plaintiff be certified as "representative of the class of pregnant minors capable of and willing to give informed consent to an abortion." Motion to Certify Plaintiffs' Classes, ¶ 1. The District Court determined that plaintiffs Mary Moe I, Parents' Aid Society, Inc., and Gerald Zupnick were adequate representatives of the classes they sought to represent and certified the action "as a valid class action as to all." *Baird I* at 852.[4]

Plaintiffs brought their action as a "facial attack" on the statute and sought declaratory and injunctive relief. *Baird I* at 849. The District Court granted a temporary restraining order and preliminary injunctive relief and, after trial, issued an opinion and entered an order permanently enjoining the defendants from enforcing the statute. *Baird I* at 857. The District Court's decision was based upon a conclusion that the parental consent requirement violated the due process rights of unmarried pregnant minors. *Baird I* at 855-57.

Defendants appealed to this Court on May 16, 1975, and, in a decision dated July 1, 1976, this Court vacated the District Court's decision on abstention grounds and directed the certification of ambiguous state law questions to the Supreme Judicial Court. *Bellotti* v. *Baird*, 428 U.S. 132 (1976) (*Bellotti I*). Upon remand, the District Court certified a series of questions concerning the statute's requirements and standards to the Supreme Judicial Court. The parties filed briefs and offered oral argument before the Supreme Judicial Court in November, 1976, and, in an opinion dated January 26, 1977, the court answered the District Court's questions. *Baird* v. *Attorney General*, Mass. Adv. Sh. (1977) 96, 360 N.E. 2d 288 (Mass. 1977) (*Attorney General*). Proceedings and preparation for a new trial began in the District Court in early February, 1977.

Plaintiffs filed their first amended complaint on February 2, 1977. This amended complaint made slightly more explicit due process claims than the original complaint, omitted any reference to the statute's endorsement of "parental vetoes" in light of the Supreme Judicial Court's construction of it in *Attorney General*, asserted the statute's invalidity on overbreadth

[4] The District Court did not include Baird within its certification because of doubts about his standing. *Baird I* at 851. These doubts have never been resolved.

grounds, and additionally claimed a denial of equal protection resulting from the exceptions contained in G.L. ch. 112, § 12F, as inserted by St. 1970, ch. 847, and renumbered by St. 1977, ch. 335, § 1. After a hearing on plaintiffs' motion for a preliminary injunction, the District Court, one judge dissenting, issued an opinion and entered an interlocutory injunction on February 10, 1977, enjoining defendants' enforcement of the statute. *Baird* v. *Bellotti*, 428 F. Supp. 854 (D. Mass. 1977) (*Baird II*). Defendants commenced discovery on February 22, 1977, and the parties engaged in discovery for the next eight months. Planned Parenthood League of Massachusetts and others filed a motion to intervene as plaintiffs on April 1, 1977, and plaintiffs filed a motion for summary judgment on April 5, 1977. The District Court held an initial hearing on these matters on April 5, 1977, and set the motions to intervene and for summary judgment for further hearing on April 13, 1977. At this hearing, the court denied plaintiffs' motion for summary judgment and ordered the parties to meet to arrange a tentative schedule for discovery and trial. The District Court denied Planned Parenthood's motion to intervene on April 21, 1977.

On July 13, 1977, the District Court entered an order setting the case for pre-trial conference on August 22, 1977. A single judge held a hearing on August 2, 1977, during which he announced that the court had denied defendants' motion for leave to contact members of the plaintiff class, leave which defendants had sought in order to conduct a survey of the consent practices of Massachusetts health care providers. (The class for which defendants sought leave to contact included all physicians and all health care institutions providing abortions to minors in Massachusetts.) The District Court held a pretrial conference on August 22, 1977, considered various discovery matters, attempted to clarify the issues, and set the case

for trial on October 17, 1977. The case was tried on October 17 and 18, 1977.

The District Court, one judge again dissenting, handed down its decision and entered an order once again declaring the statute unconstitutional and enjoining defendants from enforcing it on May 2, 1978. Although the court's decision should be read in its entirety in order to apprehend the variety of conclusions it contains, it seems fair to summarize its determinations in broad terms as consisting of several related decisions, the chief of which amount to determinations that the statute imposes impermissible burdens upon and denies equal protection to some minors. In addition, the court concluded that, despite the Supreme Judicial Court's invitation, it would not undertake to carve the offensive portions of the statute as construed from its acceptable provisions but rather would enjoin all efforts to enforce any of its requirements. Finally, the District Court awarded plaintiffs their litigation costs in both the District Court and this Court "lost because of defendants' mistaken advocacy." *Baird* v. *Bellotti*, 450 F. Supp. 997, 1006 (D. Mass. 1978) (*Baird III*). On June 19, 1978, the District Court allowed Planned Parenthood's and various others' motion for post-judgment intervention as plaintiffs over the objection of all parties, and on June 20, 1978, the court entered an amended order correcting a typographical error in its May 2, 1978, order. Defendants and defendant-intervener filed their notices of appeal to this Court in the District Court on June 26, 1978. This Court noted probable jurisdiction on October 31, 1978. *Bellotti* v. *Baird*, U.S. , 47 U.S.L.W. 3292-93 (October 31, 1978).

Summary of Factual Evidence

The factual record in this case, as with most involving legislative facts,[5] contains a great variety of evidence admitted under various theories of materiality and possessing varying degrees of relevance. Given the parties' diverse framing of the issues and the existence of ambiguities central to the case which were never resolved through the discovery process or at trial,[6] it is difficult to summarize the facts comprehensively. In place of such an effort, this summary covers the most important evidence presented concerning the nine most important factual questions:

1. The distribution of unwanted pregnancies among minors;
2. The relative risk and psychological impact of abortion surgery upon minors as compared with other forms of medical and surgical procedures;
3. The psychological ambivalence and trauma associated with a minor's abortion decision;
4. The importance of parental guidance to a minor faced with the abortion decision;
5. The proportion of minors which physicians consider should or should not inform their parents of their pregnancy;
6. The psychological effect of court proceedings upon minors;
7. The age at which minors appear to physicians as able to give informed consent;

[5] The role of legislative facts in developing the record before the District Court is discussed in Argument Section II, below.

[6] The question whether the claims of immature minors were before the District Court is a good example of a critical ambiguity which had significant implications for discovery and the presentation of evidence at trial. Although this problem is discussed in several places in the Argument, its most thorough treatment appears in Section III.

8. The rate of recidivism, i.e., the occurrence of second or more unwanted pregnancies, among minors; and
9. The formal opinion of professional groups interested in the care of adolescents and children concerning the performance of abortion surgery upon minors with or without parental consent.

1. *The Distribution of Unwanted Pregnancies Among Adolescents and Children*

Plaintiff's principal expert witness, Dr. Carol Nadelson, a psychiatrist, provided the only testimonial evidence at the second trial concerning the incidence and distribution of unwanted pregnancies among adolescents and children. Dr. Nadelson testified that she had dealt with "one or two" 10-year-olds who were pregnant, 2 App. 515-16, and the medical literature, as compiled in excerpts in defendants' requests for admissions, reports term pregnancies in minors as young as five years of age. 1 App. 210-11. The rate of pregnancies in minors between ten and seventeen appears to be increasing, 1 App. 207-13, and minors as young as nine have sought birth control information from clinics. 1 App. 213. Approximately 1,000,000 young American women, aged fifteen to nineteen, become pregnant each year, of whom approximately 590,000 give birth, 270,000 have abortions, and 140,000 experience miscarriages. 1 App. 157-58. Approximately 30,000 American minors under age fifteen become pregnant each year, of whom approximately 13,500 have abortions, 12,600 give birth, and 3,900 experience miscarriages. 1 App. 158-59.

2. *The Relative Risk and Psychological Impact of Abortion Surgery Performed on Minors as Compared with Other Medical and Surgical Procedures*

Plaintiffs' expert Dr. Nadelson was the only expert to testify at the second trial concerning the relative risk and psychologi-

cal impact of abortion surgery performed on minors. 2 App. 306-08; 313-15. At the first trial, both plaintiffs and defendants presented testimony on this subject, and the District Court's findings appear in *Baird I* at 853 and *Baird III* at 1004. Findings reported in the medical literature appear as excerpts in defendants' requests for admissions, 1 App. 177-96; 221-23; 225-33; 248-50; 252-65; 270-71; 273-75.

3. *The Psychological Ambivalence and Trauma Associated with a Minor's Abortion Decision*

The discovery process produced evidence which established that adolescents and children facing the abortion decision experience psychological problems in addition to those which adults encounter and which are uniquely related to their immaturity. For example, the evidence demonstrated that an adolescent lacks experience with her feelings and does not have the emotional control of an adult, 1 App. 221-23; that ambivalence is prominent among adolescents, 1 App. 230-31; that a period of intense anxiety and ambivalence is often experienced in the twenty-four hours prior to an abortion, 1 App. 228-29; that a pregnant adolescent is essentially a child potentially bearing a child, 1 App. 232-33; and that a pregnant minor who makes the abortion decision in collaboration with her parents is usually best prepared for the surgery. 1 App. 248-50. Plaintiffs' expert Dr. Nadelson generally agreed with these propositions. 2 App. 489-644.

4. *The Importance of Parental Guidance to a Minor Faced with the Abortion Decision*

The evidence approaches unanimity on the importance of parental support and guidance to adolescents and children facing the abortion decision. The testimony of both plaintiffs' and defendants' experts at both the first and second trials, as

well as the products of discovery, demonstrated that supportive parental involvement, obtainable in the vast majority of cases, was beneficial to pregnant minors. See *Baird III* at 1006, n. 16 (Julian, J., dissenting); 1 App. 248-50; 2 App. 37-38; 54; 82; 103-04; 111; 136; 145; 184; 226; 249-50; 539-42.

5. *The Proportions of Minors which Physicians Consider Should and Should Not Inform their Parents of their Pregnancy*

Plaintiffs' expert, Dr. Nadelson, also provided the major portion of the evidence concerning the proportions of minors which physicians consider should and should not inform their parents of their pregnancy. Dr. Nadelson testified at trial that about 40 per cent of the patients she saw at her clinic did not want to inform their parents, but would be helped by having their parents involved in the counselling process. 2 App. 343-45. At deposition, Dr. Nadelson testified that, for approximately 5 per cent of her private practice patients and approximately 10 per cent of her clinic patients, consultation with parents was "objectively contraindicated." 2 App. 541-42. By "objectively contraindicated" Dr. Nadelson meant that she, as a psychiatrist, would agree with the adolescent's view that her parents should not be informed of her pregnancy. 2 App. 338. In other words, for Dr. Nadelson's clinic patients, approximately 50 per cent wished to tell their parents, approximately 40 per cent did not wish to tell their parents but would be helped by parental involvement (i.e., parental consultation was "subjectively contraindicated" but "objectively indicated"), and approximately 10 per cent did not wish to tell their parents and would be hurt by parental involvement (i.e., parental consultation was both "subjectively contraindicated" and "objectively contraindicated"). Another of plaintiffs' experts testified that parental involvement was extremely impor-

tant although rare cases exist in which it is impossible to obtain. 2 App. 37-38. In the great majority of cases, a minor's fears that her parents would not be helpful were groundless, and, if the parents were not involved in the making of the abortion decision because of these fears, the adolescent or child would be deprived of the great benefit which parental support, everyone agreed, provides. 2 App. 104-05; 139. For a summary of this evidence, see *Baird III* at 1012 (Julian, J., dissenting).

6. *The Psychological Effect of Court Proceedings upon Minors*

Expert evidence was also introduced, necessarily based upon hypothetical circumstances, concerning the effect which involvement in court proceedings might have upon pregnant minors. Plaintiffs' expert witness, Dr. Nadelson, testified that having to go to court in the face of parental opposition to her desire to obtain an abortion would have a "severely detrimental" effect on an adolescent or child who was in basic disagreement with her parents. 2 App. 296. Dr. Nadelson also testified that some adolescents in this situation would obtain illegal or out-of-state abortions rather than obtain parental consent or judicial approval, but that accurate data quantifying the proportion of adolescents which would turn to these alternatives do not exist. 2 App. 299-301. Defendants' expert, Dr. Sprague Hazard, a pediatrician with a special interest in the care of adolescents, testified that, in those situations where a minor's parents were unalterably opposed to an abortion, a court proceeding "might" cause severe psychological trauma. 2 App. 422.

7. *The Age at which Minors Appear to Physicians as Able to Give Informed Consent*

The concept of informed consent and the ability of adolescents and children, from a physician's point of view, to assent

intelligently to the performance of abortion surgery elicited a variety of expert opinions. While the experts agreed that the percentage of minors able to give informed consent increased with age, they disagreed over the specific percentages. The District Court aptly summarized the evidence at the first trial on this subject as follows:

> Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable [of giving informed consent]. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. *Baird I* at 854.

The discovery process and the second trial did not improve upon this disparity in views.

8. *The Rate of Recidivism, i.e., the Occurrence of Second or More Unwanted Pregnancies, Among Minors*

Plaintiffs' expert Dr. Nadelson also provided the main evidence on the rate of recidivism, or the occurrence of second or more unwanted pregnancies, among minors. Dr. Nadelson testified that the literature reported recidivism rates of from 15 per cent to 95 per cent for unwanted pregnancies among minors. 2 App. 328. Dr. Nadelson also testified that her clinic's recidivism rate for unwanted pregnancies among minors was approximately 25 per cent, 2 App. 328, and that, although the recidivism rate would vary depending upon the population studied, 25 per cent represented a fair estimate of the national or statewide recidivism rate. 2 App. 329. Finally, Dr. Nadelson testified that she and most professional people believe that counselling can help reduce recidivism. 2 App. 329. In addition, plaintiffs admitted that published

studies showed varying, and high, recidivism rates for unwanted pregnancies among minors. 1 App. 196-201.

9. *The Formal Opinion of Professional Groups Interested in the Care of Adolescents and Children Concerning the Performance of Abortion Surgery upon Minors With or Without Parental Consent*

Since the flavor of this case is highly legislative, defendants brought the views of the American Academy of Pediatrics to the District Court's attention. The Academy, after a long period of study and upon the recommendation of its Committee on Youth which defendants' expert Dr. Hazard chaired, adopted a model statute governing the ability of minors to consent to health care. This model act, published in 51 Pediatrics 293 (February, 1973), incorporates the Academy's view that minors should not be considered able to give effective consent to abortions. 2 App. 369-72; 1 App. 483-98.

Summary of Argument

Appellants make five separate arguments in this brief. The first, of the greatest length, discusses the substantive constitutional questions. The remaining four, of lesser length, deal with procedural issues and matters related to the remedy which the District Court fashioned. Each is briefly summarized below.

In the first argument, appellants urge two alternative views of the statute's constitutionality: that the Court should consider it valid because it does not affect a minor's fundamental right to make the abortion decision, or, alternatively, if it does affect this right, it does so to a permissible extent and in an acceptable manner.

The second argument turns to the consideration of procedural issues. Its purpose is to point out the role of legislative facts in this case and the serious impact which the District Court's ruling on defendants' Motion for Leave to Contact Members of the Plaintiff Class had on the development of the evidentiary record.

The third argument, again concerned with procedural matters, argues that the District Court erred in permitting plaintiffs to maintain their claims against the statute on the grounds of its facial overbreadth and vagueness. Appellants also take the position that the court's consideration of the claims of persons not before it was improper.

The fourth argument concentrates on the District Court's remedy. Here appellants argue that the injunction entered is unnecessarily broad.

The fifth and final argument deals with the District Court's alteration of this Court's order concerning the award of costs in *Bellotti I*. Quite brief, it argues that the court had no authority to require the defendants to repay to the plaintiffs a sum which this Court had previously allowed as a division of costs on appeal pursuant to Rule 57.

Argument

I. The Statute is Constitutional Because it Simply Structures the Abortion Decision Making Process of Pregnant Minors to Promote their Best Interests.

This case is different from most of the abortion-related cases which this Court has considered since 1973. It is different because the statute involved relates only to minors and, rather than imposing or authorizing outright prohibitions, simply

structures the abortion decision making process to protect the best interests of adolescents and children. The District Court's failure to appreciate the significance of these critical differences led to much erroneous reasoning and a conclusion at odds with deeply-embedded social traditions.

This Court has never determined that legislation like the statute which the District Court struck down is an impermissible exercise of the state's traditional authority to regulate the practice of medicine and to promote the best interests of its minor citizens. On the two occasions in which the Court has considered closely related issues, it suggested that the validity of such legislation may well turn upon the exact nature of the statute's requirements and the effect it has on the ability of minors to make the abortion decision. *See Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52 (1976) (*Planned Parenthood*), and *Bellotti I* at 147 (comparing its observations about the statute at issue in this case with that held unconstitutional in *Planned Parenthood*).[7] Unfortunately, the District Court was not inclined to devote sufficient attention to the difficult doctrinal problems and delicate social policy questions which proper resolution of this novel case requires. Rather, it seemed content to rely upon broad, and often inaccurate, statements of law[8] and to ignore the pressing need for subtle, rather than suffocating, judicial adjustment of evolving societal values.

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[7] Moreover, at least four members of this Court have expressed their view that a statute which lacks an explicit commitment to the traditional protective objective and the procedural safeguards of the statute involved in this case should nonetheless be considered a proper exercise of the state's police power. *Planned Parenthood* at 94-95, 102-05 (concurring and dissenting opinion of White, J., in which the Chief Justice and Rehnquist, J., joined, and Stevens, J., concurring and dissenting).

[8] See, for example, the District Court's holding, discussed in greater detail below, that "[a] minor has a basic constitutional right to an abortion. . . ." *Baird III* at 1003. *Contra*, *Maher* v. *Roe*, 432 U.S. 464, 473 (1977).

Appellants seek in this initial argument section both to provide the analytical framework within which this case may be properly decided and to convince the Court that the statute satisfies constitutional requirements. The first subsection reviews principal cases thought to involve "fundamental rights" and argues that the statute does not burden any aspect of a minor's "fundamental right to privacy" as the Court has construed that concept in relation to sexual matters, including abortions. The second subsection proceeds on the assumption that the statute does affect a minor's fundamental right to privacy and argues that the statute passes muster under the intermediate "heightened" standard of review. The fundamental theme running through this second portion of appellants' argument is well-developed in Justice Stevens's dissent in *Planned Parenthood*:

> The State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place. I assume that parents will sometimes prevent abortions which might better be performed; other parents may advise abortions that should not be performed. Similarly, even doctors are not omniscient; specialists in performing abortions may incorrectly conclude that the immediate advantages of the procedure outweight the disadvantages which a parent could evaluate in better perspective. In each individual case factors much more profound than a mere medical judgment may weigh heavily in the scales. The overriding consideration is that the right to make the choice be exercised as wisely as possible. *Planned Parenthood* at 104.

Because the statute is designed precisely to serve this "overriding consideration," appellants submit that the Court should

reverse the District Court's decision and hold the statute constitutional.

A. *The Statute Does not Burden a Minor's Fundamental Right to Privacy.*

1. The Aspect of a Minor's Right to Privacy which is Involved in this Case is the Right to Decide Whether to Undergo Abortion Surgery.

Almost six years ago, this Court determined that the Constitution recognizes a right of personal privacy which "is broad enough to encompass [an adult] woman's decision whether or not to terminate her pregnancy. . . ." *Roe* v. *Wade*, 410 U.S. 113, 153 (1973) (*Roe*).[9]

This holding is unambiguous in its emphasis upon the scope of the right as extending only to the abortion *decision* and not to collateral matters except insofar as they impermissibly impinged upon that decision. *Roe* at 154-55. In reaching its conclusion the Court acknowledged its debt to another "privacy-in-decision-making" case, *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), in which the Court held that the constitutional right to privacy included the right to "be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. . . ." *Id.* at 453. Subsequent cases have reiterated the principle's formulation, frequently in reaction to its misinterpretation or misapplication by the lower federal courts. For example, in *Whalen* v. *Roe*, 429 U.S. 589 (1977), the Court rejected physicians' claims that a New York State drug reporting statute was unconstitutional because it "impair[ed] their right to practice medicine free of unwarranted

[9]The Court's decision in *Roe* explicitly denied considering the constitutionality of parental consent requirements. 410 U.S. at 165, n. 67.

state interference. . . ." *Id.* at 604. *Whalen* pointed out that the constitutional right which *Roe's* companion case, *Doe* v. *Bolton*, 410 U.S. 179 (1973),

> vindicated . . . was the right of a pregnant woman to *decide* whether or not to bear a child without unwarranted state interference. The statutory restrictions on the abortion procedures were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her *decision*. If those obstacles had not impacted upon the woman's freedom to make a constitutionally protected *decision*, if they had merely made the physician's work more laborious or less independent without any impact on the patient, they would not have violated the Constitution . . . [emphasis supplied]. 429 U.S. at 604, n. 33.

But applying the decision making privacy principle and distinguishing between state action which impermissibly interferes with the fundamental right to make the abortion decision and action which permissibly affects it is not a simple matter. Indeed, the difficulty of the task seems to have led the lower federal courts to ignore it and apply instead an entirely different principle: that a woman has a fundamental right to obtain an abortion. During the October 1976 Term, the Court had occasion to observe this error and to attempt to preclude its repetition. *Maher* v. *Roe*, 432 U.S. 464 (1977) (*Maher*), was an appeal from a decision of a three-judge district court holding unconstitutional a regulation of the State of Connecticut's Welfare Department denying reimbursement to health care providers for elective abortions performed on welfare

recipients during the first trimester. On appeal, this Court reviewed at length the nature of the fundamental right at issue in that and similar cases:

> At issue in *Roe* was the constitutionality of a Texas law making it a crime to procure or attempt to procure an abortion, except on medical advice for the purpose of saving the life of the mother. Drawing on a group of disparate cases . . ., [the Court] concluded that the Fourteenth Amendment's concept of personal liberty affords constitutional protection against state interference with certain aspects of an individual's personal "privacy," including a woman's decision to terminate her pregnancy [footnote omitted]. . . .
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> . . . . . .
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> In subsequent cases, we have invalidated other types of restrictions, different in form [from the Texas statute] but similar in effect, on the woman's freedom of choice. Thus, in *Planned Parenthood of Central Missouri* v. *Danforth*, 428 U.S. 52, 70-71, n. 11 (1976), we held that Missouri's requirement of spousal consent was unconstitutional because it "granted [the husband] the right to prevent unilaterally, and for whatever reason, the effectuation of his wife's and her physician's decision to terminate her pregnancy." Missouri had interposed an "*absolute obstacle* to a woman's decision that *Roe* held to be constitutionally protected from such interference." (Emphasis added.) Although a state-created obstacle need not be absolute to be impermissible [citations omitted], we have held that a requirement for a lawful abortion "is not unconstitutional unless it unduly burdens the right to seek an abortion." *Bellotti* v. *Baird*, 428 U.S. 132, 147 (1976). . . .

> These cases recognize a constitutionally protected interest "in making certain kinds of important decisions" free from governmental compulsion. *Whalen* v. *Roe*, 429 U.S. 589, 599-600, and nn. 24 and 26 (1977). As *Whalen* makes clear, the right in *Roe* v. *Wade* can be understood only by considering both the woman's interest and the nature of the State's interference with it. *Roe did not declare an unqualified "constitutional right to an abortion,"* as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy. . . [emphasis supplied]. 432 U.S. at 471-474.

Despite this Court's decision in *Maher*, the District Court held that "[a] minor has a basic constitutional right to an abortion [citations omitted]." *Baird III* at 1003. This determination, while appearing in the middle rather than at the beginning of the court's decision, is the obvious starting point of the court's substantive constitutional analysis. It is also, equally obviously, an incorrect one, *Maher* at 474, and the Attorney General submits that this unjustifiable legal error requires rejection of the District Court's decision.

There is more, however, to be learned from this Court's prior decisions than that the District Court interpreted them incorrectly in this case. Moreover, this additional learning is essential to proper decision, either in the District Court upon remand or in this Court should the questions involved seem appropriate for ultimate disposition. Critical in this regard is the settling of the boundaries of a minor's — as opposed to an adult's — right to privacy in abortion-related decision making cases such as this.

In *Planned Parenthood*, this Court held unconstitutional a Missouri statue requiring a physician to obtain the consent of a

minor's parent before performing abortion surgery. Mr. Justice Blackmun wrote the Court's opinion in which Justices Brennan, Marshall, Powell, and Stewart joined. However, Justice Stewart also wrote a separate concurring opinion, in which Justice Powell joined, "to indicate [his] understanding of some of the constitutional issues . . . ." 428 U.S. at 89. Justice Stewart's views concerning the statute's parental consent requirement, while consistent with the Court's, focus on the statute's "absolute limitation on the minor's right to obtain an abortion. . . ." *Id.* at 90. Thus, limiting the holding to its essentials and respecting Justices Stewart's and Powell's separate reasons for endorsing it, *Planned Parenthood's* incremental contribution to the constitutional principles applicable to abortion-related cases involving the rights of minors is the recognition of the unacceptability (parallel, of course, to the view as to adults expressed in *Roe*) of an *absolute* prohibition.

In *Carey* v. *Population Services International*, 431 U.S. 678 (1977), decided almost one year after *Planned Parenthood*, the Court was unable to agree that a minor's right to privacy, in particular that aspect of it concerned with the making of decisions related to sexual activity and reproduction, justified holding a New York statute prohibiting the sale of contraceptives unconstitutional as applied to the sale of nonprescription contraceptives to persons under sixteen years of age.[10] Perhaps reflecting this disagreement, the plurality opinion noted that "[t]he question of the extent of state power to regulate conduct of minors not constitutionally regulable when committed by adults is a vexing one, perhaps not susceptible to precise answer. . . ." *Id.* at 692. Appellants do not propose to attempt

[10] Justice Brennan wrote a plurality opinion in which Justices Stewart, Marshall, and Blackmun joined; Justices White, Stevens, and Powell concurred in the result or judgment on the basis of independent reasoning; and the Chief Justice and Justice Rehnquist dissented. 431 U.S. 691, n. 12, 702-04, 713-17.

to provide that which has eluded a majority of the Court, nor do they think such an effort necessary, for analysis of the reasoning of the individual Justices in *Carey*,[11] when first compiled with the principle recognized in *Planned Parenthood*, yields a formulation of a minor's right to privacy in the context of decision making concerning sexual matters which is at once both consistent with prior decisions and dispositive of appellees' claims against the statute in this case.

Justice Powell begins the expression of his views in *Carey* with the statement that "[t]here is also no justification for subjecting restrictions on the sexual activity of the young to heightened judicial review." 431 U.S. at 705. Extracted from its context and considered merely as an abstract matter of logic, this statement might be thought to imply that, since a fundamental right must be affected before a statute is subjected to heightened scrutiny, if heightened scrutiny is not appropriate, no fundamental right is involved. Hence, the statute at issue in this case, as one affecting the "sexual activity of the young," would clearly be constitutional. However, since Justice Powell later points with approval to *Planned Parenthood*, it seems more reasonable to conclude that, while willing to make constitutional protections against *outright prohibitions* which affect protected decision making available to adolescents and children as well as to adults, Justice Powell is inclined to go no further. *See Maher* at 474 (regulation simply denying Medicaid benefits for elective abortions "does not impinge upon the fundamental right recognized in *Roe* [footnote omitted] . . .").

[11] Consideration of the views of the plurality, since they are based upon a broader conception of the fundamental right at issue than a majority of the Court has accepted, is deferred to Argument Section B, below. In that section, appellants assume that the statute affects a fundamental right; here their purpose is to demonstrate that a majority of the Court has suggested that it does not.

Justice Stevens's views are also instructive. Justice Stevens dissented in *Planned Parenthood*, and he regards the situation in *Carey* as less persuasive.[12] Nevertheless, he concluded that the New York statute was unconstitutional because its infliction of "government-mandated harm" was "irrational and perverse" and might be "appropriately characterized as a deprivation of liberty without due process of law. . . ." 431 U.S. at 716.

Finally, Justice White, who also dissented in *Planned Parenthood*, expressed his view that the state was under some obligation to demonstrate a measurable correlation between the statute's purposes and the means it employs to achieve them. While this demonstration requirement is logically suggestive of an obligation upon the state greater than that usually associated with review under ordinary scrutiny standards, an interpretation more harmonious with Justice White's previously expressed views would be that, while heightened scrutiny is not warranted, assertions of state interests, when contradicted by common sense, will not suffice to satisfy the basic constitutional requirement that a statute "rationally [serve] valid state interests." 431 U.S. at 707 (Powell, J., concurring in part and concurring in the judgment).

Read together, the various opinions in *Planned Parenthood* and *Carey* suggest that this case may be decided by applying the following test: the statute at issue in this case is constitutional if the state demonstrates a reasonable relationship between the interests it is designed to serve and the methods it uses and unless it interferes with a minor's fundamental right to make the abortion decision by either (1) imposing an outright prohibition upon a legitimate alternative or (2) working

[12] "Consequently, even if I had joined that part of *Planned Parenthood*, I could not agree that the Constitution provides the same measure of protection to the minor's right to use contraceptives as to the pregnant female's right to abort." 431 U.S. at 713.

a deleterious distortion in the process of deciding by associating "government-mandated harm" with the choice of such an alternative. As the following section establishes, the statute creates no such interference.

2. The Court Should Conclude that the Statute is Constitutional Because it Does not Proscribe Abortions or Work a Deleterious Distortion in a Pregnant Minor's Decision Making Process.

The dispositive difference between the Commonwealth's statute and the enactment which the Court held unconstitutional in *Planned Parenthood* is that Missouri's statute contained a "blanket provision" which this Court held authorized a parent to withhold consent for any reason, thus "giv[ing] a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." 428 U.S. at 74. The Massachusetts statute, in contrast, clearly precludes such an abuse of the traditional parental authority to consent to medical treatment on behalf of children. As the Supreme Judicial Court wrote in answer to the District Court's certified questions,

> . . . there is no absolute parental veto inherent in § 12[S]. If the word veto has an application here, it is, by analogy to the legislative process, a veto which may be overriden [by a judge of the Superior Court]. *Attorney General* at 106-07, 360 N.E. 2d at 294.[13]

Despite this binding interpretation of the Commonwealth's highest court, plaintiff-interveners, in their motion to affirm

[13] The Supreme Judicial Court's decision is considered in detail in subsection B, below.

summarily,[14] insist that the statute imposes the type of "absolute, possibly arbitrary veto" which this Court determined in *Planned Parenthood* infringed impermissibly upon a minor's fundamental right to make the abortion decision.[15] The answer to this argument is as short as it is obvious: there is nothing "arbitrary" about a carefully considered judicial judgment which includes a conclusion concerning the best interests of a minor which is different from that of the adolescent or child. Indeed, appellants consider incredible plaintiff-interveners' suggestion that this Court intended in *Planned Parenthood* to prohibit the time-honored exercise of judicial superintendence which the Supreme Judicial Court so reasonably described in *Attorney General*:

> Question 2(b) [of the certified questions] concerns what a judge must do in passing on the question whether the best interests of the minor will be served. Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should

[14] Motion to Affirm of Appellees Planned Parenthood League of Massachusetts, et al., at 11-13.

[15] To an uncertain degree, the District Court seems to share this view. *Baird II* at 856; *see Baird III* at 1003 and 1004.

> prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact. *Attorney General* at 104, 360 N.E. 2d at 293.

To appellants, these remarks, far from evidencing disregard of this Court's holding in *Planned Parenthood*, represent a thoughtful judicial application, well-supported by established principles of equity jurisdiction, of traditional concerns which all members of the Court have recognized as valid. *Planned Parenthood* at 94-95 (White, J., concurring in part and dissenting in part and joined by the Chief Justice and Justice Rehnquist); *id.* at 101-05 (Stevens, J. concurring in part and dissenting in part); *Carey* at 693, n. 15 (Brennan, J., expressing his own view and the views of Stewart, Marshall, and Blackmun, JJ.); *id.* at 705-07, 709-10 (Powell, J., concurring in part and concurring in the judgment). This Court should conclude that such a careful process is quite unlike the provision struck down in *Planned Parenthood* and, therefore, that it does not constitute a potential outright prohibition which infringes impermissibly upon a minor's fundamental right to make the abortion decision.

That the statute is also unobjectionable under the second aspect of a minor's fundamental right, that entitling the decision to abort to protection from discouragement through the association of its choice with "government-mandated harm," is also certain. The statute is neutral on its face and does not discourage the selection of any of the various legitimate alternatives which comprise the abortion decision. It is also inherently neutral in application as a result of its reliance upon the best interest standard. As the Supreme Judicial Court held in *Attorney General*, "[The judge] must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests. . . ."

Attorney General at 103, 360 N.E. 2d at 293. Thus, unlike the New York statute in *Carey*, the Commonwealth does not seek to impose any sanction on the decision to abort, symbolic or otherwise. Rather, its clear purpose is to assure sound decision making in an area which all the experts who testified at the second trial agreed is fraught with difficulty for adolescents and children. 2 App. 546-63. A rule such as the one appellees propose and the District Court endorsed in part, *Baird III* at 1002-03, which prohibits the state from providing judicial protection for minors who find themselves unhappily pregnant, would be an odd extension of a minor's fundamental right to make the abortion decision, and it would certainly lack the justification of a response to the imposition of "government-mandated harm."

As traditional a purpose as the statute has, its means for achieving its goals are perhaps even more firmly rooted in our social structure. In deciding to require physicians to assure that adolescents and children have consulted with their parents before performing abortion surgery, the Massachusetts Legislature accepted the view long expressed at common law that, because their natural instinct to care and nurture surpasses the interest of any other person, a child's parents are the best guardians of its welfare. 1 W. Blackstone, *Commentaries*, Ch. 16 (natural duty of parents to maintain their children, while enforced by laws, is best guaranteed by "Providence . . . by implanting in the breast of every parent that natural or insuperable degree of affection . . ." which neither the individual parent's depravity nor rebellious children can totally extinguish); *In re Agar Ellis*, 24 Ch. D. 317, 329 (1883) (Cotton, L.J., concurring: court's determination of child's best interests must have "regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice . . ."). Parental consultation, then, is the well-accepted method of supporting

children in times of crisis and helping them make sound decisions. So clear is this general truth that all of the experts who testified at the second trial readily acknowledged it. 2 App. 390; 539-42; 579.

The District Court concluded that, while parental consultation as a general matter is advisable, the fact that some parents — the evidence suggests a small minority, 2 App. 539-42; see *Baird III* at 1002 — may not be supportive of their children is a sufficient reason to hold the statute unconstitutional on its face. *Baird III* at 1002-03. Passing for the moment the problems which such a draconian result unjustifiably creates,[16] appellants submit that, as with the general soundness of the statute's provision for judicial superintendence, its requirement of parental consultation is quite unlike the restrictions upon the distribution of contraceptives in *Carey* which Justice Stevens considered "perverse and irrational." Beneficent both in facial purpose and in the great majority of applications, strongly supported by basic social assumptions, and uniformly accepted by the experts who testified at the second trial as generally essential to the healthy development of adolescents and children, 2 App. 380; 539-42, parental consultation is a good thing, not a bad one, and the statute deserves respect, rather than condemnation, for encouraging and relying upon it. *See Carey* at 709-10 (Powell, J., concurring in part and concurring in the judgment); *Planned Parenthood* at 101-05 (Stevens, J., concurring in part and dissenting in part).

The final provision which the District Court thought justified the conclusion that the statute is unconstitutional is closely related to its reliance upon judicial superintendence and parental consultation: withdrawal of the Commonwealth's quite limited "mature minor" rule.[17] Once again, however,

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[16] These issues are discussed in Argument III, below.

[17] The Supreme Judicial Court's discussion of Massachusetts' "mature minor" rule and the District Court's erroneous view of state law in light of

the Legislature's purpose in providing greater legal protection to pregnant adolescents and children than it judges necessary in other situations[18] is not to harm its minor citizens but rather to promote their best interests. The important distinction of judgment and one which, although appellees and the District Court may question it, the Attorney General maintains is peculiarly and properly for the Legislature, is that there is no "right" answer to the abortion decision. Unlike prenatal care, the treatment of venereal disease, or other health care problems for which the choice of therapy and the need for medical intervention are obvious, and thus the operation of a "mature minor" rule appropriate, see Mass. Gen. Laws Ann. ch. 112, § 12F, and ch. 111, § 117 (West Supp. 1978), the abortion decision includes at least two alternatives, completion of pregnancy and abortion, which are mutually exclusive and vary in their appropriateness depending upon a minor's individual circumstances. 2 App. 561-63; 582-83; 587. Such considerations, in addition to those which the Supreme Judicial Court mentioned in *Attorney General* at 107, 112, 360 N.E. 2d at 294, 297, and this Court noted in *Maher* at 480 (state may impose different requirements affecting abortion decision under welfare program since "other procedures do not involve the termination of a potential human life . . ."), well justify the Legislature's decision to provide the greatest protection possible to adolescents and children faced with an unanticipated pregnancy. Thus, the withdrawal of the mature minor rule is an appropriate means, among the others which the stat-

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the Massachusetts' court's comments are discussed in detail in subsection B, below.

[18] The broad statutory and, hence, presumably the limited judicial "mature minor" rule as well, are also inapplicable in cases involving methadone maintenance therapy and sterilization. Mass. Gen. Laws Ann. ch. 112, §§ 12E and 12F (West Supp. 1978); *see Attorney General* at 110, n. 9, 111, 360 N.E. 2d at 296, n. 9, 297. See subsection B, below.

ute employs, for promoting sound decision making. The District Court's invalidation of this difficult legislative decision and the substitution of its own judgment as to the proper approach, see *Baird III* 1003-04, finds no support in this Court's cases and deserves firm rejection.

In summary, the abortion decision, unlike those decisions considered in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965), *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972), and *Carey*, involves an intense, unavoidable conflict of values which often seriously troubles those who must choose. 2 App. 552-53. It is also a decision which, lacking a "right" answer, must be made as carefully as possible, since the process of deciding plays a critical role in helping the pregnant woman avoid psychological trauma and provides much of the justification for the ultimate choice. These attributes, strong enough in the case of adult women, are generally thought to overpower the young. 2 App. 502-03. This Court should conclude that the state has the authority to recognize the peculiar difficulty of the abortion decision and to call upon our society's long-standing approaches to protecting its minor citizens, parental support and judicial superintendence, to provide the necessary help. *See Planned Parenthood* at 91 (concurring opinion of Justice Stewart in which Powell, J., joined); *id.* at 101-05 (Stevens, J., concurring in part and dissenting in part). Recognition of the appropriateness of these methods renders the special concerns which prompt invocation of fundamental right analysis (outright prohibitions and "government-mandated harm") inapposite, and the Court should thus conclude that the statute does not affect a minor's fundamental right to make the abortion decision. Therefore, since under ordinary standards of judicial scrutiny, see *Maher* at 478-81; *Carey* at 707 (Powell, J., concurring in part and concurring in the judgment), the statute is clearly constitutional, the District Court's decision to the contrary should be reversed.

B. *The Statute Serves Significant State Interests in a Manner Long Recognized at Common Law, and the Court Should Therefore Determine that it is Constitutional.*

A conclusion that the statute does interfere with a minor's fundamental right to make the abortion decision may permit this Court to review its provisions under stricter constitutional standards.[19]

While appellants believe that "heightened" scrutiny of the statute, for the reasons discussed in the previous subsection, is inappropriate, they recognize that disagreement on this point exists among members of the Court, and the purpose of the argument presented in the following pages is to demonstrate that the Court should consider the statute constitutional even if it is subjected to heightened judicial review.[20]

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[19] Cases that suggest that the implication of a fundamental right, sufficient to trigger heightened scrutiny in matters involving adults, need not do so if the challenged legislation is aimed at minors include *McKeiver* v. *Pennsylvania*, 403 U.S. 528 (1971) (although "fundamental to American scheme of justice," minors not entitled to trial by jury in juvenile deliquency proceedings); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970) (minors may be denied right to vote); and *Ginsberg* v. *New York*, 390 U.S. 629 (1968) (minors' First Amendment rights may be restricted in a manner which would be unconstitutional if adults involved). However, since the result of concluding that the statute interferes with a minor's fundamental right to make the abortion decision but, on the basis of *McKeiver*, *Mitchell* or *Ginsberg*, refusing to subject the statute to heightened scrutiny, would be to review it under ordinary standards, and since it is clear that the statute satisfies these standards, appellants do not discuss this possibility separately.

Moreover, it does not matter whether the presence of a suspect classification in a statute affecting minors could trigger strict scrutiny, *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 16 (1973); *Dunn* v. *Blumstein*, 405 U.S. 330, 342-43 (1972), because no suspect classification is involved in this case.

[20] Since the highest level of scrutiny does not apply to legislation affecting minors, appellants do not analyze the statute's provisions according to "strict scrutiny" requirements. *Carey* at 693 and n. 15 ("[s]tate restrictions inhibiting privacy rights of minors are valid only if they serve 'any significant state interest . . . that is not present in the case of an adult . . .' [citing *Planned Parenthood*]" and noting that "[t]his test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults . . .") (plurality opinion of Brennan, Stewart, Marshall, and Blackmun, JJ.); *id.* at 702-03 (White, J., concurring in part and concurring in the result); *id.* at 703, 705-07 (Powell, J., concurring in part and concurring in the judgment); *id.* at 713-14 (Stevens, J., concurring in part and concurring in the judgment); *see id.* at 717-19 (Rehnquist, J., dissenting). Rather, analysis is limited to the statute's validity under the "middle tier" of scrutiny. See *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972); *Reed* v. *Reed*, 404 U.S. 71, 76 (1971); L. Tribe, *American Constitutional Law*, 1082-92 (1978); Gunther, *The Supreme Court, 1971 — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 30-36 (1972) (all discussing "middle tier").

In addition, appellants do not treat equal protection considerations, with the exception of those related to the Commonwealth's limited "mature minor" rule and a comparison of the statute's provisions with those of Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1978), separately from substantive due process concerns since, at least in this area of the law, little difference now seems to exist between criteria used or results obtained under these two formerly more distinct aspects of the Fourteenth Amendment. *Hathaway* v. *Worcester City Hospital*, 475 F. 2d 701, 706, n. 5 (1st Cir. 1973) ("[a]lthough we frame our holding in equal protection terms, we note that *Roe* and *Doe* establish that the same compelling interest analysis applies when fundamental rights are adjudicated in due process terms . . ."); *see Baird III* at 1004 (court regards statute as "imposing an undue burden in the due process sense and a discriminatory denial of equal protection . . ."); L. Tribe, *American Constitutional Law*, 992, n. 13 (citing examples in which the due process and equal protection clauses of the Fourteenth Amendment "have . . . been held to yield [indistinguishable] norms of equal treatment . . ."); *cf. Maher* at 473 (in context of equal protection challenge, Court referred to both "undue burden" and "degree and justification" language in *Bellotti I* as suggesting contours of fundamental rights analysis).

1. The Statute Advances Significant State Interests for Which the States Have Traditional Responsibility.

That the state has the authority, indeed the obligation, to promote the best interests of its minor citizens is a proposition inherited from the English common law and now well-estab-

lished in our own jurisprudence. *See, e.g., Wellesley* v. *Wellesley*, 4 Eng. Rep. 1078 (H.L. 1828) (power of Court of Chancery, recognized for over 150 years, to promote best interests of minors on King's behalf as parens patriae is not open to question); *Eyre* v. *Shaftsbury*, 24 Eng. Rep. 659, 664 (Ch. 1722) ("the King is bound of common right, and by the laws to defend his subjects . . ."). Blackstone traces the doctrine back to Fitznerbert's Naturia Brevium, 3 W. Blackstone, *Commentaries* *427, a source which Story characterizes as "a very ancient work of great authority . . . ," 2 Story, *Equity Jurisprudence* *666, and Story himself considered the power well-established. *Id.* at *672. Perhaps the most persuasive recent explanation in a constitutional context of this obligation and the increased authority over adolescents and children which it justifies the state's exercising appears in Mr. Justice Stevens's dissent in *Planned Parenthood*, cited with approval by the plurality in *Carey*:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent. Indeed, such consent is essential even when the young woman is already pregnant. The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible. Therefore, the holding in *Roe* v. *Wade* that the abortion decision is entitled to constitutional protection merely emphasizes the importance of the decision; it does not lead to the conclusion that the

> state legislature has no power to enact legislation for the purpose of protecting a young pregnant woman from the consequences of an incorrect decision. *Planned Parenthood* at 102; *Carey* at 693, n. 15.

Appellants recognize that, under *Planned Parenthood*, legislation which interferes with a minor's constitutional right to make the abortion decision must have as its purpose interests which are "significant," and not just "legitimate," and that these interests must be a function of the peculiarities of youth and immaturity, and not just interests which are "present in the case of an adult." *Id.* at 74-75. Of course, the Court has already suggested that a minor's immaturity is itself a sufficient basis for requiring parental consultation subject to judicial superintendence, *Planned Parenthood* at 75; *Bellotti I* at 147-48, and the evidence introduced at the second trial supports the Legislature's implicit determination that the abortion decision, unlike many other health care decisions minors may make, is sufficiently difficult and troublesome to warrant special statutory provisions intended to "maximiz[e] the probability that [it] be made correctly and with full understanding of the consequences of either alternative." *Planned Parenthood* at 103 (Stevens, J., dissenting).

A desire to provide protection against improvident decision making related to a minor's immaturity or the other peculiar problems of adolescence and childhood, 1 App. 248-50, is, of course, a significant state interest with which the state need not be concerned in the case of adults. In addition, recognition of the difficulties of adolescence and a determination to sanction what all the experts who testified at the second trial agreed is the best source of assistance to pregnant and frequently distressed teenagers and children — parental consultation and support — is also a significant interest unique to the

circumstance of minority. Finally, the evidence compiled at the first trial identifies an additional interest which the state may reasonably consider uniquely related to the protection of minors: the willingness of some abortion clinics and physicians, including the appellees in this case, to perform abortion surgery upon adolescents and children without providing the counselling which plaintiffs' own expert testified is essential to a minor's healthy psychological development and an effective method of reducing the rate of unwanted pregnancy recidivism. See *Planned Parenthood* at 91, n. 2 (Stewart, J., concurring and reviewing record in *Bellotti I*); 2 App. 504-05. Appellants submit that the record in this case as well as long-recognized social assumptions embodied in our common and constitutional law demonstrate that the statute indeed serves significant state interests and thus satisfies the initial requirement of heightened judicial scrutiny.

2. The Statute Employs Appropriate Means to Accomplish its Purposes, Means which have Long Been Recognized as Within the Police Power and the Functions of the Judiciary.

The Supreme Judicial Court's answers to the District Court's certified questions in *Attorney General* provide a detailed discussion of the means which the Legislature chose to advance the significant state interests just discussed. While the statute's conduct-conforming device is a prohibition against a physician's performing abortion surgery upon an unmarried minor unless a set of preconditions is satisfied, the preconditions themselves are the Legislature's principal tools for working its will, and there are four of them: first, consent of the pregnant adolescent or child; second, consent or consultation with the minor's parents; third, in those cases in which the minor and her parents disagree, a provision for judicial

superintendence of the decision; and, fourth, application of the best interests standard at all appropriate points in the decision making process.[21]

All of these methods of promoting sound decision making by minors and, hence, of advancing their best interests are time-honored, appropriate means for achieving the Legislature's ends. The statute's first precondition, that a physician obtain a minor patient's consent before performing abortion surgery upon her, is consistent with the Legislature's desire to provide increased protection to pregnant adolescents and children. At common law, since the consent of a minor to a medical or surgical procedure was ineffective, physicians were under no compulsion to secure it and could deal with the parents alone. *In re Seiferth*, 309 N.Y. 80, 87, 127 N.E. 2d 820, 824 (1955) (Fuld, J., dissenting); *In re Sampson*, 65 Misc. 2d 658, 670, 317 N.Y.S. 2d 641 (Ulster Cnty. Fam. Ct. 1970) (quoting with approval Judge Fuld's dissent in *Seiferth*), *aff'd*, 29 N.Y. 2d 900, 278 N.E. 2d 918 (1972); *see In re Hudson*, 13 Wash. 2d 673, 709-10, 126 P. 2d 765 (1942) (decision to permit minor to undergo surgery is responsibility of parents). Thus, the statute's initial precondition works a salutary change in the common law and, since *Planned Parenthood* approved a state statute requiring physicians to obtain the consent of their adult women patients, the Court should approve this precondition *a fortiori*.[22]

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[21] Additional mechanisms related to the judicial superintendence function, e.g., availability of counsel, expedited judicial consideration, and so forth, are fully discussed in *Attorney General* and were not subject to criticism in the District Court. Indeed, the District Court declared the functioning of the court process a "non-issue," 1 App. 153, and did not afford it separate treatment.

[22] Of course, under the terms of the District Court's injunction, appellants may not enforce even this uncontroversial provision.

The statute's second precondition, as construed by the Supreme Judicial Court in *Attorney General*, is that a physician must obtain the consent of both of a pregnant minor's parents before performing surgery. According to the Supreme Judicial Court, this consent is required, if such a requirement is constitutional, in all cases and without regard to the availability of the Commonwealth's limited mature minor rule in other situations. *Attorney General* at 105-12, 360 N.E. 2d at 293-97. While the District Court thought it should deny the Legislature this means of achieving its goals, more careful and sympathetic consideration of the problems involved than the District Court was inclined to give leads to the opposite conclusion.

As an initial matter, one should realize that, prior to the statute's enactment, the status of the Massachusetts rule governing parental consent to the provision of medical or surgical care was not entirely clear. Although the District Court seemed content to rely upon evidence of professional practice (and quite limited evidence at that, see Argument Section II, below, and *Baird I* at 854), legal sources suggest that, at least in certain situations, the consent of both parents may be necessary. *Cf. Reddington* v. *Clayman*, 334 Mass. 244, 246-47, 134 N.E. 2d 920, 921-22 (1956) (battery action against surgeon by parents for unauthorized removal of tissue during tonsillectomy suggesting consent of both parents required); 1966 Op. A.G. 247 (in which the Attorney General advised the Commissioner of Mental Health to obtain the consent of both of a minor patient's parents); *see also* Mass. Gen. Laws Ann. ch. 201, § 5 (West Supp. 1978) (parents share custody of their child "jointly"). Not only did the statute resolve this ambiguity in the case of abortions, but it did so for perfectly sound reasons. Given the difficulty of the abortion decision, the implications it has for the individual child, her parents, and the family, and the real possibility that parents themselves may disagree over the proper decision and profit from consultation

with their daughter and discussion between themselves, the statute's dual consent requirement makes good sense. Appellants submit that the Legislature should not be denied the ability to rely upon parental collaboration in its effort to assure sound decision making.[23]

The second aspect of the parental consent precondition is that it is applicable in all situations. Postponing consideration of the withdrawal of the Commonwealth's limited "mature minor" rule to the following separate equal protection section, appellants concentrate here on the District Court's dissatisfaction with the Legislature's decision to impose a uniform requirement. See *Baird III* at 1004. Legislative judgments, by their nature designed for the general case, are often subject to criticism in particular circumstances. This type of critique, however, is generally not thought a sufficient reason to invalidate a statute on its face, even if it implicates fundamental rights. *Cf. Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973), discussed further in Argument Section III, below. Moreover, recognition of the general acceptability of a legislative determination is particularly appropriate when the standard of review is merely more stringent rather than strict. In this case, the District Court determined on the basis of only one expert's opinion that a small number of minors in Massachusetts would find their parents unsupportive if they consulted them. The Legislature might well have assessed the probabilities differently or judged, with Blackstone, that the force of natural parental affection would ultimately rally even the most distressed parents to their daughter's aid. As Justice Stevens wrote in *Planned Parenthood*,

[23] Previous decisions of this Court have recognized the importance of the family unit in our society. *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

> If there is no parental-consent requirement, many minors will submit to the abortion procedure without ever informing their parents. An assumption that the parental reaction will be hostile, disparaging, or violent no doubt persuades many children simply to bypass parental counsel which would in fact be loving, supportive, and, indeed, for some indispensable. It is unrealistic, in my judgment, to assume that every parent-child relationship is either (a) so perfect that communication and accord will take place routinely or (b) so imperfect that the absence of communication reflects the child's correct prediction that the parent will exercise his or her veto arbitrarily to further a selfish interest rather than the child's interest. *A state legislature may conclude that most parents will be primarily interested in the welfare of their children, and further, that the imposition of a parental-consent requirement is an appropriate method of giving the parents an opportunity to foster that welfare by helping a pregnant distressed child to make and to implement a correct decision* . . . [emphasis supplied]. *Planned Parenthood* at 103-04.

Implicit in Justice Stevens's view is acceptance of the possibility, which appellants also acknowledge, that some parents will disappoint their children and frustrate the Legislature's effort to promote sound and compassionate decision making. However, appellants submit that the Court should consider such a possibility, undeniably an unlikely one, 2 App. 539-42, an insufficient basis for sustaining a facial attack against the statute, especially when the challenged provision is also, in the vast majority of cases, undeniably salubrious.

The statute's third and fourth preconditions, judicial authorization in the case of disagreement among daughter and

parents and application of the best interests standard, need only the briefest comment. As the Supreme Judicial Court points out in *Attorney General*, the courts of the Commonwealth have long acted as guardians of the state's young citizens. *Attorney General* at 109-10, 360 N.E. 2d at 296. In doing so, they have consistently been guided by a paramount concern for the child's welfare. *Id.* Judicial authorization and the best interests standard, then, are two of the Commonwealth's traditional means for providing special protection to minors, and there should be no doubt that their use to advance the statute's purposes is well within the Legislature's competence.

The choice of means to achieve governmental goals has long been the legislature's responsibility. This Court has recognized that federal judicial supervision of the discharge of this responsibility by state government should generally be deferential and, in the case of legislation affecting minors, particularly so. The District Court, proceeding on the basis of an erroneous legal theory, see page 23, above, determined to prescribe its view of the proper methodology, and steadfast in its unwillingness to accept the statute's declared purpose, see *Baird III* at 1004, concluded that the statute should be rejected on its face and in its entirety. Appellants submit that, when judged according to the proper legal standard, without a prescriptive purpose, and with acceptance of its authoritatively determined goals, the statute warrants approbation. Therefore, this Court should conclude that the statute is a constitutional exercise of the Legislature's traditional authority and reverse the District Court's determination to the contrary.

3. The Statute Does not Deny Equal Protection of the Laws to Pregnant Minors.

Without articulating its standard of review, the District Court concluded that the statute denied mature, unmarried pregnant minors equal protection of the laws. The court's conclusion was apparently prompted by the Legislature's determination not to permit physicians to rely upon the Commonwealth's limited "mature minor" rule when undertaking to perform abortion surgery upon adolescents and, in addition, by the Supreme Judicial Court's decision that, unless barred by constitutional considerations, conscientious performance of a judge's duties under the statute required consideration of "all the relevant views presented to him," *Attorney General* at 104, 360 N.E. 2d at 293, and not just the assessment of a minor's "maturity." In addition, plaintiffs argued that the statute, when read in conjunction with Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1978) (§ 12F), also violates equal protection requirements. The District Court's reasoning, based as it is upon a fundamental misreading of the Supreme Judicial Court's opinion in *Attorney General*, is amenable to summary refutation once this error is apprehended; similarly, an adequate response to appellees' § 12F argument is available in *Attorney General*.

The District Court begins its analysis of "the mature minor and unequal protection" by stating that the Supreme Judicial Court determined in *Attorney General* that "Massachusetts did have *the mature minor rule*, but that the statute rejected it with respect to abortions . . . [emphasis supplied]." *Baird III* at 1003. But the Supreme Judicial Court did no such thing. Indeed, despite defendants' urging before it, the Court explicitly refused to adopt the "mature minor" rule which it acknowledged prevailed in other jurisdictions:

> We think, however, that it may be of assistance to the District Court to state the extent to which a mature minor rule of the character urged by the defendants would have been applicable if § 12[S] had not been passed. By doing so, we will disclose the impact of § 12[S] on the rights of minors.
>
> A mature minor rule has been accepted in other jurisdictions, thereby relaxing the harshness of a rigid requirement of parental consent. . . .
>
> Our cases have given no explicit sanction to the view that, without parental involvement, an unemancipated but mature minor may consent to an operation, where one or both parents are available and where there is no medical emergency. . . .
>
> We conclude that, apart from statutory limitations which are constitutional, *where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth* . . . [emphasis supplied]. *Attorney General* at 108-09, 111, 360 N.E. 2d at 295-96.

That the Supreme Judicial Court was willing to adopt only a very limited version of the "mature minor" rule really could not be clearer.[24]

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[24] The Supreme Judicial Court's reluctance in this regard may be explained by its view of Mass. Gen. Laws Ann. ch. 112, § 12F (West Supp. 1978), discussed below, as a "legislative mature minor rule." *Attorney General* at 111, n. 9, 360 N.E. 2d at 296, n. 9. In light of the Legislature's recent interest in the area, the court may have thought it inappropriate to supply judge-made law.

Thus, in Massachusetts, it simply is not true that a physician may perform, say, abdominal, non-emergency surgery upon an unmarried minor not within the scope of § 12F without first obtaining parental consent and then hope to defend successfully against a subsequent action for battery on the basis of the "mature minor" rule, for this defense would be available only in the limited circumstances described in *Attorney General* (i.e., when a mature minor's best interests would be advanced by avoiding parental consultation). More pertinently, it is not true that, but for the statute, an unmarried mature minor might consent to abortion surgery and a physician thus be relieved from the obligation to obtain parental consent. Rather, the consent of such an adolescent would be sufficient only if it would be in her best interests not to consult with her parents.

The District Court's misapprehension of Massachusetts' limited "mature minor" rule also seems to have contributed to its objections concerning the role of a judge in proceedings under the statute involving mature minors. The essence of the District Court's criticism seems to be that the statute, as construed by the Supreme Judicial Court, authorizes a judge to consider "all relevant views presented to him" in order to determine a minor's best interests, rather than confining his inquiry to those facts which are probative of a minor's maturity. But of course, under the limited Massachusetts mature minor rule, parental consent may be dispensed with only if doing so is in a minor's best interests. Thus, a determination of this question must be made at some point, and there is no reason to think it objectionable for a judge to do it in advance of the performance of surgery rather than for a jury to do it afterwards in the context of an action for battery or malpractice. In short, once the scope of the Massachusetts "mature minor" rule is properly understood, the statute's effect upon its operation becomes much narrower than the District Court

thought, and this narrowed availability of a rule which itself lacks constitutional dimensions should not precipitate a conclusion of unconstitutionality.

As far as appellees' § 12F claim is concerned, the Attorney General sees little need to add to the Supreme Judicial Court's comments on the subject in *Attorney General*. See *id.* at 123-26, 360 N.E. 2d at 302-03. The one additional point worth making is that *Attorney General* was written before this Court's decision in *Maher*, and it seems obvious that this Court recognized in *Maher* that the very nature of the abortion decision, in addition to its unusual difficulty and the psychological implications previously discussed, is itself a sufficient reason for the Legislature's treating it differently from other decisions concerning medical and surgical care. *Maher* at 480 ("[t]he simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life . . .").

C. Conclusion

Appellants submit that this Court should be reluctant to disagree with the Massachusetts Legislature over the proper balance to strike between the competing values and alternative methods for protecting pregnant adolescents and children which this case involves. For, in addition to the problems discussed at length in the preceeding pages, there are innumerable additional matters, factual, legal, and ethical,[25]

[25] See, e.g., the testimony of defendants' expert witness, Dr. Ernest Krug, concerning the ethical problems physicians face when their minor patients request them to refrain from telling their parents of their pregnancy. 2 App. 446-52.

which only a legislative body can hope to consider properly. Recognition of the limitations of substantive due process adjudication should lead the Court to uphold the statute's facial validity and leave further refinements in its operation to the legislature, an "ultimate guardian . . . of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. R. Co.* v. *May*, 194 U.S. 267, 270 (1904), cited in *Maher* at 480.

II. The District Court Abused its Discretion in Refusing to Permit Appellants to Conduct a Survey of the Parental Consent Requirements of Massachusetts Health Care Providers and, as a Result, Based its Decision on an Inadequate Record.

In their Initial Statement of Disputed Material Facts, 1 App. 125-40, the defendants suggested to the District Court that a large number of facts, legislative in nature, were in controversy and that proper decision required their development through trial. The District Court agreed with defendants' position and denied plaintiffs' motion for summary judgment. 1 App. 152. Among the facts which the defendants included in their Initial Statement as material and in dispute were questions concerning the parental consent practices of Massachusetts health care providers which provide medical and surgical services to adolescents and children. 1 App. 135, 137-39. The importance of this information is its nature as a benchmark against which the statute's requirements might be compared: if the statute merely codifies existing professional practice or otherwise only slightly alters requirements which most physicians in Massachusetts must already meet before performing abortion surgery upon minors, its provisions should not be considered a significant source of interference with a minor's constitutional right to make the abortion decision.

Ethical considerations contained in the Code of Professional Responsibility as adopted by the Supreme Judicial Court, see Sup. J. Ct. Rule 3:22, DR 7-104(A) and E.C. 7-18 (1972), made it necessary for defendants to seek the District Court's permission before they sought to contact Massachusetts health care providers since many of the institutions were members of the plaintiff classes. Motion to Certify Plaintiffs' Class; *Baird I* at 850-52. Despite the fact that the plaintiffs did not object to defendants' proposed survey as long as they received a copy of the survey materials, the District Court denied defendants' request. 1 App. 295-96.

Cases involving substantive due process challenges to the constitutionality of state statutes require the federal courts to make difficult determinations of legislative fact. Indeed, the Chief Justice commented on this problem in *Doe* v. *Bolton*, 410 U.S. 179, 208 (1973) (Burger, C.J., concurring), and recognition of it in other contexts, including both economic regulation and important personal rights, has led the Court to disavow an interest in substantive due process and the concomitant responsibility for finding legislative facts in order to arrive at sound rules. *See City of New Orleans* v. *Dukes*, 427 U.S. 297, 303-04 (1976); *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 55 (1973); *Ferguson* v. *Skrupa*, 372 U.S. 726, 730-32 (1963). These well-recognized difficulties make it imperative that courts not rebuff a party's attempt to bring material and probative legislative facts to their attention. See Miller and Barron, *The Supreme Court, the Adversary System, and the Flow of Information to the Justices: A Preliminary Inquiry*, 61 Va. L. Rev. 1187 (1975).

In this case, as preparations for the major prehearing conference began and the allotted period for discovery drew to a close, it became apparent that plaintiffs were not interested in exploring the question of health care provider practices. This lack of interest on their part was the more unusual since the

classes they represented were composed of the very people who could best inform the District Court of the relationship between their traditional practices and the statute's requirements.[26] To remedy this potential gap in the information available to the District Court, the defendants designed a questionnaire and compiled a representative sample of health care providers to survey concerning their parental consent requirements. 1 App. 287-92. By denying defendants' motion for leave to contact members of the plaintiff classes, the District Court precluded itself, and this Court, from developing an understanding of the relationship between the statute's provisions and existing health care provider practices. Defendants submit that this denial, given the importance of its effect upon the evidentiary record, amounts to an abuse of discretion which warrants reversal or remand.

III. The District Court Erred in Entertaining Plaintiffs' Facial Attack Against the Statute on the Grounds of Vagueness and Overbreadth.

During the third day of the first trial in this case, plaintiffs stipulated that they brought their challenge to the statute on its face and not as applied to the named plaintiffs before the court. 2 App. 213. The District Court accepted this stipulation and characterized plaintiffs' action as a facial attack in its first opinion. *Baird I* at 849, 850, n. 5, 857. However, plaintiffs' original class certification motion purported to include only mature minors within the scope of the class of minors represented, and the District Court certified the classes repre-

[26] The record of the original trial on this question was extremely limited, consisting primarily of the views of one or two individual practitioners. See *Baird I* at 854. Defendants believed that sound decision required a more scientific approach to the problem.

sented by Mary Moe I, Parents Aid Society, Inc., and Dr. Zupnick as requested. *Baird I* at 850-52. Specifically, the District Court determined that Mary Moe I (the only minor who testified at the first trial and who remains as a named plaintiff) was "fairly representative of a substantial class of unmarried minors in Massachusetts *who have adequate capacity to give a valid and informed consent*, and who do not wish to involve their parents . . . [emphasis supplied]." *Baird I* at 850.

During the course of the second trial, the defendants on several occasions sought to clarify the status of plaintiffs' claims, in particular whether they involved criticism of the statute based upon its inclusion of immature minors within its scope. The impetus for defendants' curiosity was plaintiffs' inclusion in their amended complaint of claims formulated in traditional facial overbreadth and vagueness terms, claims which, defendants presumed, were to be evaluated according to established criteria. Continuously unsuccessful in their pretrial efforts, defendants were finally able, in the closing moments of the second trial, to convince the District Court that the question of the status of immature minor claims required clarification. The court's interest prompted the dialogue excerpted and reproduced in the footnote and the exchange of correspondence, order of court, and formal response which are included in the appendix.[27] 1 App. 415-26. In their

[27] [191] Judge Aldrich: Judge Julian and I have been talking off the cuff. Are you contending that this statute is unconstitutional insofar as it applies to minors who are incapable of consenting?

Mr. Balliro: Yes.

Judge Aldrich: You are?

Mr. Balliro: Yes, we are.

Judge Julian: You did not so allege in the complaint. The complaint does not make any allegation with respect to anybody who is not a mature minor capable of understanding.

Mr. Balliro: I would respond by saying that we did not exclude that.

response to the District Court's order, the plaintiffs explicitly waived any claims against the statute based upon its inclusion of immature minors, 1 App. 426, and have taken the same position in writing in this Court. Plaintiffs-appellees' Memorandum in Support of Their Motion to Strike the Appearance of Counsel for Planned Parenthood League of Massachusetts, et al., at 5.[28] The result of plaintiffs' actions was to confine their claims before the District Court and now in this Court to those of mature minors. It is solely as to this group then, presumably composed entirely of adolescents, that the propriety of plaintiffs' facial attack should be evaluated.

JUDGE JULIAN: You did not include it. You are the plaintiff who makes the allegation.

[192] JUDGE ALDRICH: Would you give us a rough idea what argument you would make with respect to a minor who everybody would agree was not mature enough to consent?

MR. BALLIRO: I am not sure I would, Your Honor, upon considered reflection after listening to all the evidence. I merely do not want to waive that at this point, that's all.

JUDGE ALDRICH: That is a fair enough proposition, but I think you and your brethren ought to have an understanding with respect to that so that we will know what ball field we are playing on.

The discussion of this issue continues at some length in the transcript. 2 App. 473-86.

[28] Despite this unequivocal record, the District Court nevertheless asserted that plaintiffs could not waive the claims of immature minors since doing so would be a breach of their duty "as representatives of the classes that at least Dr. Zupnick purported to represent . . .," *Baird III* at 1001, n. 6. Purported representation, unaccompanied by actual evidence and argument and waived explicitly prior to decision, is too slender a reed to support such a significant burden.

The District Court may also have concluded that the statute was unconstitutional as to immature minors as well as to those capable of making the abortion decision. See *Baird III* at 1001. However, if it did so, its decision was in spite of the lack of allegations and evidence concerning immature minors, the absence of immature minors from the certified class represented by Mary Moe I, and plaintiffs' explicit waiver. It also stands in opposition to

This Court established the general rule applicable to procedural facial attacks[29] on the basis of overbreadth or vagueness in *Broadrick* v. *Oklahoma*, 413 U.S. 601, 610 (1973), and noted that such proceedings are highly unusual because:

> Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in situations not before the Court. [Citations omitted.] A closely related principle is that constitutional rights are personal and may not be asserted vicariously. [Citation omitted.]

Yet the situation in this case is more at war with these traditional principles than was the situation in *Broadrick*. *Broadrick* prohibits, in effect, the assertion of *jus tertii* possessed by absent plaintiffs by present plaintiffs who do not possess those rights. Here, by contrast, the District Court permitted present plaintiffs (mature minors) who *arguendo* possessed certain rights to assert *jus tertii* of absent plaintiffs (immature

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this Court's views in *Planned Parenthood*. See *id.* at 104 (Stevens, J., dissenting, "[c]ourt assumes that parental consent is an appropriate requirement if the minor is not capable of understanding the procedure . . .").

[29] Appellants distinguish for analytical purposes between procedural facial attacks which involve consideration of the rights of persons not before the court, the classic form of facial attack in the First Amendment area, and substantive facial attacks, i.e., those in which plaintiffs assert on their own behalf that the unconstitutionality of a statute may be determined by comparing it with substantive constitutional principles. In the District Court, differentiating between these two types of facial attacks and determining which type plaintiffs were pressing proved a difficult task. 2 App. 471-86.

minors) whose claims, if any, are quite attenuated and different from those of the plaintiffs before the court. See note 28, above.

Despite *Broadrick's* admonitions, the District Court appears to have considered plaintiffs' facial attack as a procedural one, at least in part, and its conclusions concerning overbreadth are erroneous for three reasons. First, although the court considered the statute's "chilling effect," *Baird III* at 1004-05, it failed to recognize that this consideration is limited to cases involving First Amendment rights. *Young* v. *American Mini Theatres*, 427 U.S. 50, 59 (1976); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-13 (1973); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). Since plaintiffs' claims involve no First Amendment issues, the District Court's acceptance of a procedural facial attack predicated upon the application of the "chilling effect" doctrine was erroneous.

Second, a procedural facial attack, necessarily involving the claims of absent individuals, should have been unavailable to the plaintiffs in this case (mature minors) who were both before the court and the only ones with significant constitutional claims. See note 28, above. Because the claims of the class of mature minors could have been satisfied by an adjudication of the constitutionality of the statute as it might be applied to them, the District Court should have refrained from deciding the constitutional issues on a broader basis or to a greater extent than the record required. *Street* v. *New York*, 394 U.S. 576, 581 (1969). Moreover, because First Amendment rights were not involved, and because a narrower means of resolving the controversy was available to the District Court, a facial attack upon the statute was improper. *Young* v. *American Mini Theatres*, 427 U.S. 50, 60 (1976); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216 (1975); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 611-13 (1973); Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 891-901 (1970).

Third, the District Court's determination that the statute violated the constitutional rights of immature minors was improper because the mature minors before the District Court had no standing to assert another *jus tertii* claim, that of the statute's non-severability. It is settled law that, where a statute has been held unconstitutional in other applications, a new plaintiff to whom the remainder of the statute has been applied is the proper party to claim that the statute is non-severable.[30] *United States* v. *Raines*, 362 U.S. 17, 23 (1960); *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 606-07 (1972).

The District Court's mistaken acceptance of a procedural facial attack upon the statute has had a substantial impact on the Commonwealth's attempt to provide protection to its youngest citizens. As the chart reproduced at page 67 demonstrates in diagrammatic form, the statute is valid in two-thirds of the situations[31] within its scope, i.e., the pregnancy of all minors, whether mature or immature, in the second or third trimester. *Roe* at 164; *but see Baird III* at 1001 (court stated that "minor's . . . need of an abortion without her parents' knowledge is not limited to the first trimester . . .," apparently suggesting that statute might not regulate the performance of second and third trimester abortion surgery). Similarly, there should be no question that the statute is constitutional with respect to immature minors in the first trimester. See note 28, above. The remaining one-sixth portion of the statute's scope, that which includes mature minors in the first tri-

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[30] "Successful facial attacks predicated upon inseparability seem to be a thing of the past." Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 849, n. 19 (1970).

[31] The chart does not purport to represent a quantification of the proportion of individuals who populate its categories or the distribution of the occurrence of abortions among them as the District Court, despite defendants' efforts, seemed to think. See *Baird III* at 1001.

mester, is the only aspect of its coverage which is subject to criticism and, within this portion, three-quarters of its component situations create no controversy.[32] Finally, and most significantly, the record establishes that physicians should expect only about ten per cent of the individuals in this situation to find parental consultation both "objectively contraindicated" and "subjectively contraindicated." 2 App. 338-43; 539-42. To invalidate a statute which the record demonstrates exhibits the opposite of "substantial overbreadth" highlights the sound reasons why this Court disfavors facial attacks. The District Court's failure to appreciate these reasons and apply them properly in this case warrants reversal of its judgment.

IV. A Conclusion that the Statute Contains Unconstitutional Requirements or is Capable of Unconstitutional Applications does Not Justify its Total Rejection, and the Court Would Further Legislative Intent by Permitting Enforcement of the Statute's Constitutional Provisions.

The Massachusetts General Court originally adopted the statute as § 12P in St. 1974, ch. 706. It acted against the background of this Court's recent ruling in *Roe* v. *Wade*, and the legislation's title, "An Act to protect unborn children and maternal health within present constitutional limits," reflected the Legislature's two-fold concern that it implement its policy judgments while observing constitutional restrictions. One of the methods which the Legislature chose to

[32] The statute obviously injures no minor who desires to consult her parents and, according to plaintiffs' expert witness, advances a desirable end when it requires physicians to obtain parental consent from those patients for whom consultation is "objectively indicated."

achieve its goals was to include an unusually precise severability clause in the act:

> If any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act. St. 1974, ch. 706, § 2.

The Supreme Judicial Court, in its answers to the District Court's certified questions in *Attorney General*, not only noted the statute's unusual severability clause, but also expressed its intention that its construction of the statute should "conform" with this Court's *future* determinations of federal constitutional law:

> Our principal advice to the Federal District Court is that we would construe § 12[S] to preserve as much of the expressed legislative purpose as is constitutionally permissible. The fact that the Supreme Court has not yet defined the permissible scope, if any, of parental involvement in an unmarried minor's decision to seek an abortion makes certain of our constructions of § 12[S] potentially infirm. If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation. *Attorney General* at 100-01, 360 N.E. 2d at 292.

The statute's detailed severability clause and the Supreme Judicial Court's permissive and future-oriented expression of

its principles of construction are indeed unusual. However, they are also a reasonable reaction to the novelty of the constitutional principles which *Roe* announced. Moreover, they represent the combined efforts of the Commonwealth's legislative and judicial branches to fashion protective, constitutional legislation in a situation of unavoidable uncertainty. The District Court, unsympathetic to the state's difficulties and unwilling to acknowledge the error of *Baird I's* construction of the statute, see *Baird III* at 1004, rejected the Supreme Judicial Court's invitation to construe the statute to conform to constitutional requirements. It also refused to accept the alternative which defendants offered of enjoining only those requirements or applications which it concluded were incompatible with the Constitution. *Baird III* at 1005-06. Appellants argue in this section that the District Court abused its remedial powers by refusing to sever the statute's offending provisions, adopt a limiting construction, or enter an injunction no broader than required to vindicate its view of a minor's constitutional rights.[33]

The District Court's majority opinion relied upon this Court's decision in *United States* v. *Reese*, 92 U.S. 214, 221 (1875) (statute held unconstitutional which had both constitu-

[33] The District Court's willingness to strike the statute down in its entirety created the additional problem, closely related to those discussed in Argument Section III, above, that the parties before the Court had no right to request such broad relief. As this Court held in *Butts* v. *Merchants & Miners Transportation Co.*, 230 U.S. 126 (1913), where a statute has been declared unconstitutional in other applications, a new plaintiff to whom the remainder of the statute has been applied is the proper party to contend that the statute is non-severable and therefore cannot be enforced against him. This rule, consistent with traditional standing principles, should have precluded the District Court from granting any broader relief than was necessary to protect the rights of those before it. *See United States* v. *Raines*, 362 U.S. 17, 23 (1960); Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court*, 71 Yale L.J. 599, 606-07 (1972).

tionally permissible and impermissible applications), to justify its refusal to sever the unconstitutional parts of the statute from those which had not been challenged or which were clearly constitutional.[34] *Baird III* at 1005-06. *Reese*, however, states an inapplicable exception to the severability rule which this Court has generally applied in recent years.[35] Under the modern rule, a statute need not be constitutional in all its possible applications in order to withstand a constitutionally based facial attack. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971) (upholding facial constitutionality of statute, found constitutional as applied to the facts of the case, while recognizing there might be unconstitutional applications of same section to other facts); *United States* v. *Raines*, 362 U.S. 17, 20-24 (1960) (same); *see Dorchy* v. *Kansas*, 264 U.S. 286, 289-90 (1924); Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76, 82-102 (1937). As a result of these cases, the *Reese* rule now appears to be limited to situations in which "a criminal statute would necessitate such a revision of its text as to create a situation in which the statute no longer gave an intelligible warning of the conduct it prohibited." *United States* v *Raines*, 362 U.S. 17, 22 (1960) (citing *Reese* and limiting its application). Indeed, one member of the District Court's majority, while refusing to adopt a limiting construction to save the statute in this case,

[34] For reasons previously discussed, see Argument Section III, above, there should be no question that the statute is constitutional with respect to all minors, mature or immature, in the second or third trimesters. *Roe* at 164. Similarly, there should be no question that the statute is constitutional with respect to immature minors in the first trimester. See note 28, above.

[35] The District Court appears to rely on a supposed distinction between severance of language and severance of application in refusing to save any part of the statute. *Baird III* at 1005, n. 10. The District Court's reliance upon *Reese* in this regard is also misplaced. *Griffin* v. *Breckenridge*, 403 U.S. 88, 104 (1971); *United States* v. *Raines*, 362 U.S. 17, 20-24 (1960) (discussed further in the text).

elsewhere joined in an opinion which acknowledges the general rule which appellants urge here:

> The general rule on separability, when part of a statute *or some of its applications* are declared to be constitutionally invalid is that the rest of the statute shall stand intact if the valid provisions *or applications* are capable of being given effect standing alone, and *if the Legislature would have intended* the statutes to stand with the invalid provisions stricken out . . . [emphasis supplied]. *Baird* v. *Davoren*, 346 F. Supp. 515, 522 (D. Mass. 1972) (Murray, D.J., joined by Aldrich, C.J., and Julian, D.J.).

The Supreme Judicial Court's opinion in *Attorney General* makes it clear that the statute is amenable to limiting constructions designed to conform its requirements to constitutional norms. First, as appellants suggested to the District Court, the statute could be construed as inapplicable to mature minors in the first trimester. *Attorney General* at 106, 111-12, 360 N.E. 2d at 294, 297. Second, the scope of the statute's judicial superintendence provision, as embellished by the Supreme Judicial Court, could be held inapplicable to mature minors, as the dissenting judge in the District Court suggested. *Baird III* at 1015-20 (Julian, J., dissenting); *Attorney General* at 106-07, 111-12, 360 N.E. 2d at 294, 297. Third and finally, the uniform requirement of parental consultation, again as interpreted by the Supreme Judicial Court, could be construed as not encompassing situations in which a judge, invoking traditional principles of equity jurisdiction, determines that consultation would be harmful. *Attorney General* at 112, 360 N.E. 2d at 297. The choice of any or all of these alternatives would at once alleviate perceived constitutional difficulties as

well as avoid the *Reese* proscription against severing statutory provisions in such a way that the remainder no longer provides intelligible warning of prohibited conduct.

The Supreme Judicial Court's opinion in *Attorney General* also makes it clear that further interpretation of the statute by the federal courts would be consistent with its and the Legislature's wishes. Judicial reluctance to construe statutes in order to save them from possible constitutional defects appears in general to be based upon two considerations: first, a concern that constructions involving consideration of legislative fact may be prone to error since courts lack the fact-finding apparatus available to legislatures; and, second, a respect for the legislative process which prompts a desire to avoid judicial constructions which frustrate legislative intent. Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L. Rev. 844, 893-97 (1970). Neither of these two considerations applies in the present case.

First, the limiting constructions which appellants suggest are not likely to suffer from the type of error which results from the lack of legislative fact-finding apparatus. The evidentiary record in this case, consisting primarily of legislative fact, is fairly extensive and supports the soundness of the suggested constructions. See 2 App. 490-611; 1 App. 177-213; 221-23; 226-33; 248-50; 252-65; 270-71; 273-75. Additionally, the distinctions upon which the constructions are based are tied to decisional law (the first trimester exception of *Roe* v. *Wade* and the limited mature minor rule which the Supreme Judicial Court adopted in *Attorney General* for areas other than abortion).

Second, both the Commonwealth's Legislature and its Supreme Judicial Court have expressed the expectation that the federal courts will construe the statute to the maximum extent possible to save as much of it as possible. The sufficiency of such an expression of legislative and judicial intent as

justification for the adoption of the limiting constructions which appellants propose was endorsed by a dissent in *Planned Parenthood*:

> The question whether a constitutional provision of state law is severable from an unconstitutional provision is *entirely* a question of the intent of the state legislature. *Planned Parenthood* at 100 (White, J., dissenting, in an opinion in which the Chief Justice and Justice Rehnquist joined) (emphasis in original).

Besides its misplaced reliance on *Reese*, the District Court's opinion offers no accepted reason for refusing defendants' request that it construe the statute in a manner which preserves its constitutionality or enter an injunction narrowly drawn to prevent its unconstitutional application. Rather, the court seems determined to prevent the statute's survival and to chastise the Legislature and the Supreme Judicial Court. *Baird III* at 999, 1005. Such stubbornness, based upon an inverted application of the principles of statutory interpretation and without justification in the policies underlying judicial deference to legislative enactments, does not deserve this Court's endorsement. Rather, if the Court concludes that the statute contains invalid provisions or is capable of unconstitutional applications, it should accept the invitation of both the Massachusetts Legislature and its Supreme Judicial Court to construe it so that it achieves its protective objectives "within present constitutional limits."

V. The District Court Lacks Authority to Alter this Court's Order Concerning the Award of Costs in Bellotti I.

On August 2, 1976, this Court entered an order pursuant to Rule 57(2) awarding Clerk's costs to the appellants and dividing the costs of printing the record in *Bellotti I* between appellants and appellees.[36] The District Court, in the closing paragraph of its opinion and without making any findings or citing authority, ordered that "Plaintiffs are entitled to costs, including recovery of costs paid as a result of the previous appeal, lost because of defendants' mistaken advocacy." *Baird III* at 1006. This statement, unwarranted by any rule or decision of this Court, Sup. Ct. Rule 57(2), 28 U.S.C. App. (1976); *Bradstreet* v. *Potter*, 41 U.S. (16 Peters) 317 (1842) (stating the rule now codified in Rule 57); *see Broffe* v. *Horton*, 173 F. 2d 565 (2d Cir. 1949) (citing precursor of Rule 57 and refusing to allow "costs [to] abide the event"), is also unjustified by any traditional basis for imposing costs as a penalty for improper conduct. Indeed, it is hard to divine any justification for it.

This case is over four years old. Commenced against a prior Attorney General of the Commonwealth in 1974, appealed to this Court in 1975 and argued and decided in 1976, heard in the Supreme Judicial Court on certified questions later that year, and retried in the District Court in 1977, it reaches this

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[36] The order provides that:

> . . . it is ordered and adjudged by this Court that the judgment of the United States District Court in these causes be, and the same is hereby, vacated, with one half of the total costs of printing the record and the Clerk's costs to be taxed against appellees therein. . . .
>
> It is further order that the said appellants Francis X. Bellotti, Attorney General of Massachusetts, et al., in No. 75-73, recover from William Baird, et al., Three Thousand Three Hundred and Fifty-two Dollars and Eighty [cents] . . . for their costs herein expended.

Court on a substantial record and brings fundamental questions for decision. Since the current Attorney General assumed responsibility for the litigation, appellants have offered arguments in the statute's defense which, in large measure, both this Court and the Supreme Judicial Court have found convincing.[37] Further, at no point have appellants acted other than in discharge of their responsibilities under the statutes of the Commonwealth. Mass. Gen. Laws Ann. ch. 12, § 3 (West 1976) (Attorney General to defend actions on behalf of the Commonwealth); *Feeney* v. *Commonwealth*, Mass. Adv. Sh. (1977) 1959, 1964-65, 366 N.E. 2d 1262, 1265 (1977) (ch. 12, § 3, consolidates responsibility for all legal matters involving the Commonwealth in the office of the Attorney General).

On this record one looks in vain for the "mistaken advocacy" to which the District Court referred. Certainly the "mistake" cannot be one of determining to mount a defense, for the statute is defensible. *See Bellotti I* at 147; *Planned Parenthood* at 75. And certainly it cannot be the difference between defendants' view of the statute's provisions and that of the Supreme Judicial Court, for the views are so similar.[38] And certainly it cannot be a reference to the District Court's ultimate disagreement with defendants' arguments, for this

[37] Perhaps most significant among these is the defendants' position that the statute should be interpreted as a protective legislative act designed to advance the best interests of adolescents and children through reliance upon traditional social institutions rather than, as plaintiffs argued and the District Court determined, an enactment vesting parents with an arbitrary veto over their child's abortion decision. *Bellotti I* at 143-47; *Baird I* at 856; *Attorney General* at 102-03, 360 N.E. 2d at 292-93; *but see Baird III* at 1004.

[38] The District Court often refers to "defendants' mistaken assumptions," the "radically different" nature of the statute as defendants viewed it and the Supreme Judicial Court construed it, and their "singular" or "peculiarly incorrect, and inappropriate" arguments. Appellants regard this use of language as poetic rather than, as its literal interpretation would suggest, attributive of bad faith.

issue, as the court itself recognized, *see Baird III* at 1006, must await this Court's judgment.

Appellants submit that there is no justification in law or established principles of judicial discretion for the District Court's order altering this Court's order of August 2, 1976. Therefore, its judgment in this regard should be vacated and this Court's order reaffirmed.

Conclusion

For the reasons discussed, the Court should reverse the District Court's judgment and enter judgment determining that the statute is constitutional and reaffirming its previous order concerning the division of costs incurred in *Bellotti I*.

Respectfully submitted,

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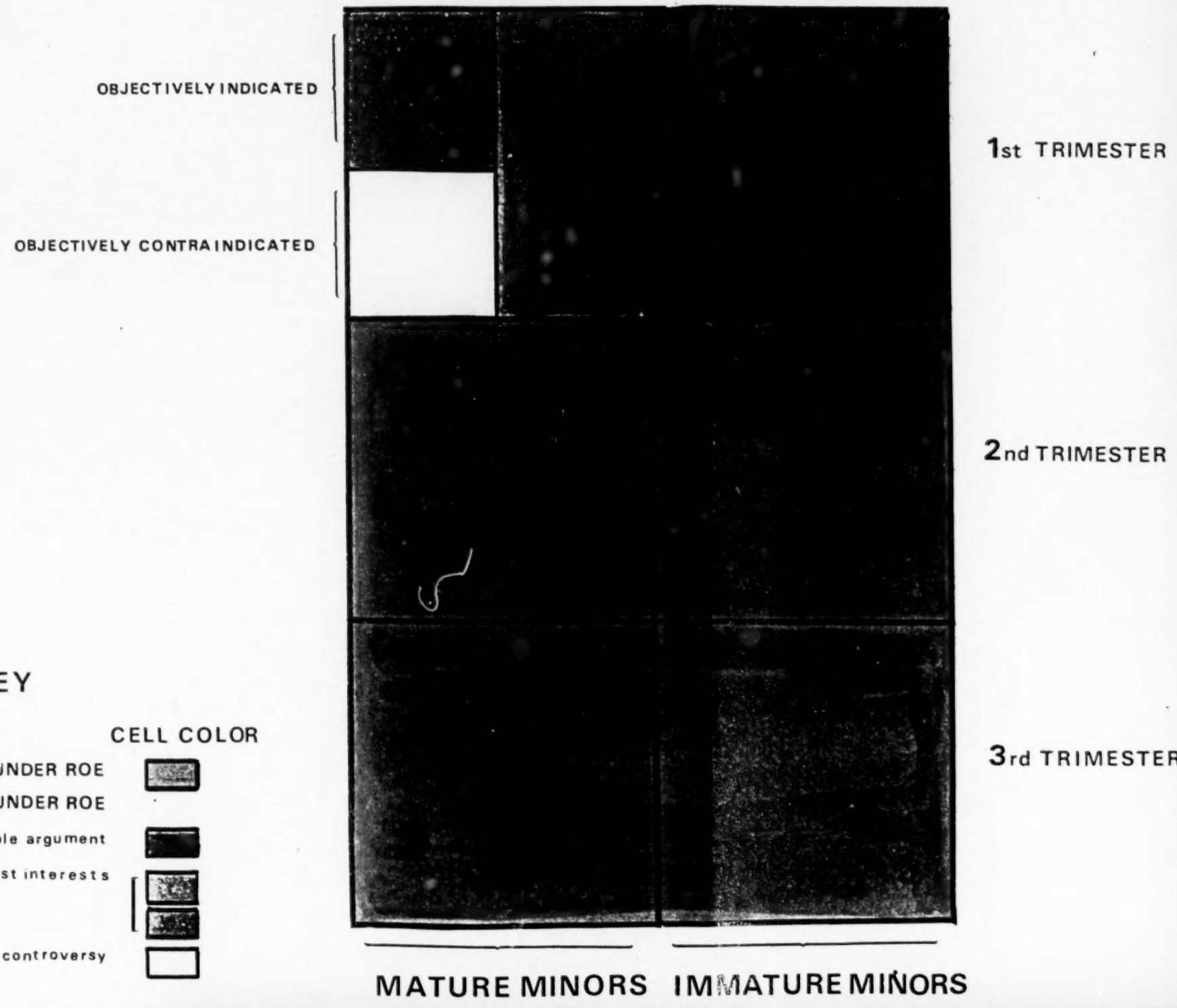
Addendum.


SUBJECTIVELY CONTRAINDICATED
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OBJECTIVELY CONTRAINDICATED
1st TRIMESTER
2nd TRIMESTER
3rd TRIMESTER
MATURE MINORS
IMMATURE MINORS
KEY
STATUS
CELL COLOR
VALID UNDER ROE
CONTROVERSIAL UNDER ROE
No credible argument
Consistent with best interests
Legitimate controversy